No. 46148-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

JOHN R. RING, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Toni A. Sheldon, Judge

No. 12-1-00407-2

BRIEF OF RESPONDENT

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A. STATE'S RESTATEMENT OF APPELLANT'S ASSIGNMENTS OF ERROR

1. Appellant was denied his right to a unanimous jury verdict when the jury was instructed regarding an alternative means for possessing stolen property for which there was insufficient evidence.

2. There was insufficient evidence to prove the value element required to convict appellant of possession of stolen property.

3. Appellant was denied effective assistance of counsel when defense counsel failed to conduct adequate discovery and investigate a key witness.

4. Remand is necessary for the trial court to reconsider appellant's exceptional sentence.

B. STATE'S COUNTER-STATEMENTS OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. The definitional term "conceal" was included within a string of terms in the to-convict jury instruction for the offense of first degree possession of stolen property. Did inclusion of this term create an alternative means of committing the offense, and if so, was there sufficient evidence in the record to prove that Ring "conceal[ed]" stolen property?

2. The State charged Ring with first degree possession of stolen property, which requires proof that Ring possessed stolen property with a value of more than $5,000. The only evidence of value presented in this case was the testimony of an insurance agent who testified that the insurance company paid out a claim of $13,800 for the stolen property, which the company later sold for salvage value for $4,400. Was the evidence sufficient to sustain a finding that the value of the stolen property was more than $5,000?

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3. Ring was charged with possession of stolen property, but he was not accused of being the person who originally stole the property. Prior to the beginning of trial, Ring's trial counsel had not learned the identity of a person who may have been the person who originally stole the property. Trial counsel was, therefore, hindered from summoning this person as a witness. Where the identity of the person who stole the property was irrelevant to the charge of possession of stolen property, was Ring's trial counsel ineffective for failing to locate this person and present him as a witness at trial?

4. Ring faced trial in the trial court under four separate cause numbers, which together comprised two separate trials, which resulted in numerous convictions. These convictions were consolidated into two appeals, No. 46148-0 (the current case) and 46145-5. Due to the great number of convictions and the fact that Ring had 14 offender points, the trial court sentenced Ring to an exceptional sentence for one count of the instant case. If one or more of Ring's convictions is reversed on appeal, should he be resentenced in this case only?

B. FACTS AND STATEMENT OF THE CASE

On or about May 17, 2012, someone stole Ferdinand Schimtz's Waverunner and its trailer. RP 54-62. The Waverunner and trailer were insured; so, the insurance company assumed title of the stolen items, paid their value to Schmitz, and initially suffered a loss of $13,000.00 for the Waverunner and $800.00 for the trailer. RP 56, 72.

A day or two after the theft, John Ring sent a text message to William Kennedy and told him that he would be dropping off a

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Waverunner and trailer at his property for storage. RP 32-33, 37. Kennedy had known Ring for about 30 years, and he often let Ring store things at his property. RP 33. Kennedy testified that Ring leased some part of Kennedy's land and used it to do repair work. RP 40. The morning after receiving the text from Ring, Kennedy saw the Waverunner and trailer at his property. RP 42.

On October 1, 2012, a supervisor at the Mason County Sheriff's Office ordered Deputy Dodge to go to Kennedy's property and investigate an anonymous tip that Schmitz's Waverunner and trailer were at Kennedy's property. RP 45-54. Deputy Dodge found the Waverunner inside a brush shed on Kennedy's property. RP 76. The Waverunner was underneath a tonneau cover. RP 76. The vin plate was missing from the trailer. RP 77.

After Deputy Dodge located the Waverunner and trailer, the insurance company recovered them and sold them at auction for salvage value. RP 72-73. The winning bid was $4,400.00. RP 73.

The State charged Ring with possession of stolen property in the first degree. CP 71. While the case was pending trial, Ring was released on conditions but then failed to appear as ordered by the court. RP 86-92. The State then filed an amended information that added a second count,

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bail jumping, to the original charge of possession of stolen property in the first degree. CP 52-53.

After receiving the evidence, the jury returned guilty verdicts on both counts. RP 18-19.

Sentencing of these convictions occurred at the same time as the sentencing of another of Ring's trials in the same court. RP 243-48. The parties initially calculated Ring's offender score at 15, but then corrected themselves and correctly calculated an offender score of 14. RP 241. Due to the great number of convictions, the trial court ordered an exceptional sentence for count I, first degree possession of stolen property. RP 248; CP 6-7. The court imposed a standard range sentence, but under the "free crimes" analysis ordered that this count would run consecutively to Ring's other conviction in this case and consecutively to his numerous convictions in the other case. RP 248; CP 6, 7, 10.

C. ARGUMENT

1. The definitional term "conceal" was included within a string of terms in the to-convict jury instruction for the offense of first degree possession of stolen property. Did inclusion of this term create an alternative means of committing the offense, and if so, was there sufficient evidence in the record to prove that Ring "conceal[ed]" stolen property?

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The charging document in this case alleged, in relevant part, that Ring committed the offense of possession of stolen property in the first degree because he "did knowingly receive, retain, possess, conceal, or dispose of stolen property...." with a value of over $5,000.00. CP 52.

The court instructed the jury as follows:

> A person commits the crime of possessing stolen property in the first degree when he knowingly possesses stolen property that exceeds $5,000 in value.
>
> Possessing stolen property means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

CP 31 (Jury Instruction No. 8). The corresponding *to-convict* instruction then stated, in relevant part, that it was an element that must be proved beyond a reasonable doubt that Ring "knowingly received, retained, possessed, concealed stolen property...." CP 39 (Jury Instruction No. 16). Hence, the charging document and the definitional instruction (No. 8), both contain the disjunctive "or" between "conceal" and "dispose," whereas the elements instruction (No. 16) erroneously omits the word "or."

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Ring contends that inclusion of the word "conceal" within the string of words cited above specified an alternative means of committing the offense of possessing stolen property and that, therefore, to sustain the conviction there must be substantial evidence to support a finding that Ring *concealed* stolen property. Br. of Appellant at 7-10. To support this contention, Ring cites the 2004, Court of Appeals case of *State v. Lillard*, 122 Wn. App. 422, 93 P.3d 969 (2004). Br. of Appellant at 9.

In response, the State contends that there is substantial evidence in the record that Ring concealed the property at issue. At the outset, Ring concealed the Waverunner by storing it on Kennedy's land rather than on his own land. RP 45-54. The Waverunner was covered up in a brush shed. RP 76. While it may have looked like a Waverunner despite the cover, without entering the shed and uncovering it, it was nonetheless unrecognizable as the stolen Waverunner. RP 76. The vin plate was missing from the trailer. RP 77. The State contends that these facts constitute substantial evidence that Ring concealed the Waverunner.

Additionally, the State contends that the 2007, Supreme Court case of *State v. Smith*, 159 Wn.2d 778, 154 P.3d 873 (2007), supports the proposition that inclusion of the term "conceal" in the jury instructions did not create an alternative means that the State was required to prove. *Smith*

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stands for the proposition that inclusion of the word "conceal" on the facts of the instant case created, at most, a "means within a means" for which "the constitutional right to a unanimous jury verdict is not implicated and the alternative means doctrine does not apply." *Smith*, 159 Wn.2d at 783, (citing *In re Pers. Restraint of Jeffries,* 110 Wn.2d 326, 339, 752 P.2d 1338 (1988)).

The statutory language that establishes the offense of possession of stolen property in the first degree reads as follows:

> (1) A person is guilty of possessing stolen property in the first degree if he or she possesses stolen property, other than a firearm as defined in RCW 9.41.010 or a motor vehicle, which exceeds five thousand dollars in value.

RCW 9A.56.150. The term "conceal" does not appear in the statute creating the offense. Instead, the term "conceal" is derived from the statutory definition of the term "possessing stolen property[,]" as follows:

> (1) "Possessing stolen property" means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

RCW 9A.56.140.

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The State contends that because the term "conceal" was derived from the statutory definition of "possessing stolen property," it is not an alternative means of committing the offense and, therefore, no error occurred in the instant case based upon inclusion of the term "conceal." *Smith*, 159 Wn.2d at 785-86.

2. The State charged Ring with first degree possession of stolen property, which requires proof that Ring possessed stolen property with a value of more than $5,000. The only evidence of value presented in this case was the testimony of an insurance agent who testified that the insurance company paid out a claim of $13,800 for the stolen property, which the company later sold for salvage value for $4,400. Was the evidence sufficient to support a finding that the value of the stolen property was more than $5,000?

A conviction of first degree possession of stolen property requires proof that the value of the stolen property exceeds $5000. RCW 9A.56.150. "Value" means the market value of the property at the time and in the approximate area of the criminal act. RCW 9A.56.010(21)(a); *State v. Kleist*, 126 Wn.2d 432, 434, 895 P.2d 398 (1995); *State v. Longshore*, 97 Wn. App. 144, 148, 982 P.2d 1191 (1999), *aff'd*, 141 Wn.2d 414, 5 P.3d 1256 (2000). Market value is the price "a well-informed buyer would pay to a well-informed seller, where neither is

obliged to enter into the transaction." *Kleist,* 126 Wn.2d at 435 (citing *State v. Clark,* 13 Wn. App. 782, 787, 537 P.2d 820 (1975)); see also *Longshore,* 97 Wn. App. at 148. Market value is determined by an objective standard; it is not based on the value of the goods to any particular person. *Longshore,* 97 Wn. App. at 148–49 (citing *Kleist,* 126 Wn.2d at 438).

In the instant case, evidence of the value of the stolen Waverunner and trailer was limited to the testimony of an insurance agent who testified that before the items were recovered the insurance company paid out a claim of $13,000.00 for the Waverunner and $800.00 for the trailer. RP 56, 72. And after the items were recovered, they were sold at auction for $4,400.00. RP 73. The State contends that this evidence was sufficient to sustain the jury's verdict of guilty.

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), citing *State v. Theroff,* 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd,* 95 Wn.2d 385, 622 P.2d 1240 (1980). On review of a jury conviction, the evidence is viewed in the light most favorable to the State and is viewed with deference to the trial court's findings of fact. *State v. Salinas,* 119 Wn.2d 192, 829 P.2d

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1068 (1992). Circumstantial and direct evidence are equally reliable in determining sufficiency of the evidence. *State v. Delmarter,* 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In the instant case, where the insurance company paid out a claim of $13,800.00 it is reasonable for the jury to have inferred that the items were insured for their market value or for less than the market value. After the items were recovered, it is reasonable to infer that the Waverunner and trailer values were diminished after they were stolen because the fact that they were recovered stolen property would likely cause concern to any potential buyer.

The State contends that viewed in light of the standard of review for claims against the sufficiency of the evidence, the evidence here was sufficient to sustain the jury's verdict. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Delmarter,* 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

3. Ring was charged with possession of stolen property, but he was not accused of being the person who originally stole the property. Prior to the beginning of trial, Ring's trial counsel had not learned the identity of a person who may have been the person who originally stole the property. Trial counsel was, therefore, hindered from summoning this person as a witness. Where the identity of the person who stole the property was

irrelevant to the charge of possession of stolen property, was Ring's trial counsel ineffective for failing to locate this person and present him as a witness at trial?

Ineffective assistance of counsel is a two-pronged test that requires the reviewing court to consider whether trial counsel's performance was deficient and, if so, whether counsel's errors were so serious as to deprive the defendant of a fair trial for which the result is unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32-34, 246 P.3d 1260 (2011).

Here, Ring contends that his trial did not take necessary steps to summon as a trial witness a person who Ring suspected was the person who originally stole the stolen property that Ring possessed. Br. of Appellant at 15-22. But Ring has not shown how this potential witness's testimony would have been relevant or useful at trial. *Id.*

In regard to the offense of possessing stolen property, RCW 9A.56.140(2) provides that "[t]he fact that the person who stole the property has not been convicted, apprehended, or identified is not a defense to a charge of possessing stolen property." Ring was not charged with having stolen the property in this case; he was charged with possessing the property, knowing that it was stolen. CP 52. There is no

evidence in the record of the instant case to show that this witness would have had any testimony relevant to the instant case.

The State contends that Ring's counsel was not ineffective for not working harder to summon the witness to trial, because, regardless who stole it, it is unlikely that this witness could have offered testimony that would be relevant to whether Ring possessed the stolen property. But even if Ring's counsel should have taken greater efforts to summon the witness, there is no showing that there is a reasonable probability that the outcome of the trial would have been different if Ring's counsel would have summoned this witness. To prevail on an ineffective assistance of counsel claim, Ring must demonstrate prejudice by showing that but for the deficient performance, there is a reasonable probability that the outcome of the trial would have been different. *Strickland*, 466 U.S. at 697; *State v. Foster,* 140 Wn. App. 266, 273, 166 P.3d 726 (2007). Because Ring has not made this showing, the State contends that his ineffective of assistance of counsel claim should be denied.

4. Ring faced trial in the trial court under four separate cause numbers, which together comprised two separate trials, which resulted in numerous convictions. These convictions were consolidated into two appeals, No. 46148-0 (the current case) and 46145-5. Due to the great number of convictions and the

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fact that Ring had 14 offender points, the trial court sentenced Ring to an exceptional sentence for one count of the instant case. If one or more of Ring's convictions is reversed on appeal, should he be resentenced in this case only?

The State does not contest that, if one or more of Ring's convictions currently under consideration by the Court in either cause number 46148-0 or 46145-5 is reversed (and does not result in a conviction on retrial), then Ring should be resentenced on the instant case.

The State agrees that under these conditions a resentencing would be appropriate so that the court may take into account the adjusted number of free crimes before imposing an exceptional sentence.

D. CONCLUSION

The State asks that this Court to deny Ring's appeal and affirm his conviction.

DATED: January 20, 2015.

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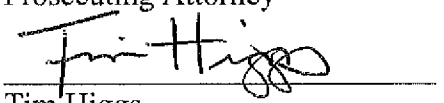

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